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COA NO. 36015-6-III

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

STATE OF WASHINGTON,

Respondent,

v.

AMEL DALLUGE,

Appellant.

ON APPEAL FROM THE SUPERIOR COURT OF THE
STATE OF WASHINGTON FOR GRANT COUNTY

The Honorable David Estudillo, Judge

BRIEF OF APPELLANT (AMENDED)

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A. ASSIGNMENTS OF ERROR

1. Defense counsel's request for an affirmative defense instruction violated appellant's Sixth Amendment right to the effective assistance of counsel.

2. The court violated appellant's constitutionally protected right to be present at all critical stages of trial.

3. The \$200 criminal filing fee imposed as part of the sentence is unauthorized by statute.

4. The cost of supervision imposed as part of the sentence is unauthorized by statute.

5. The \$100 DNA fee imposed as part of the sentence is unauthorized by statute.

6. The interest notation in the judgment and sentence is unauthorized by statute.

Issues Pertaining to Assignments of Error

1. In a prosecution for failing to comply with sex offender registration requirements, the affirmative defense instruction required the defendant to prove that he complied with the requirements. Was defense counsel ineffective in proposing an affirmative defense instruction that shifted the burden of proof away from the State and onto the defendant?

2. A defendant has a constitutionally protected right to be present at all critical stages of trial. The court may proceed in the defendant's absence only when the defendant knowingly, voluntarily, and intelligently waives the right to be present. The court must indulge every presumption against waiver. Did the trial court violate appellant's right to be present when it allowed the examination of a witness and closing argument in his absence?

3. Where the amended statute prohibiting imposition of a criminal filing fee against indigent defendants applies to cases pending on direct appeal, whether the \$200 criminal filing fee must be vacated because appellant is indigent?

4. Where the amended statute prohibiting imposition of discretionary costs on indigent defendants applies to cases pending on direct appeal, whether the cost of community custody supervision must be stricken from the judgment and sentence because appellant is indigent?

5. Where the amended statutory provision governing imposition of a DNA fee against those who have already provided a DNA sample applies to cases pending on direct appeal, whether the \$100 DNA fee must be vacated because appellant is indigent?

6. Whether the notation in the judgment and sentence directing accrual of interest on all legal financial obligations must be

amended to state that no interest shall accrue on non-restitution obligations, as mandated by the amended statute applicable to appellant's case?

B. STATEMENT OF THE CASE

Amel Dalluge appeals from his conviction and sentence for failure to register as a sex offender. CP 107-08.

1. Trial Evidence

Dalluge was convicted of a sex offense in 1998. Ex. 24. In 2014, Keith Edie, the sex offender monitor and registering officer for Grant County at the time, handled Dalluge's initial registration. 1RP¹ 233, 238, 244. Upon learning that a sex offender has moved into the county, the sheriff's office goes over the registration rules. 1RP 235-37. Dalluge was given a copy of the Grant County Rules and Regulations for Offender Registrations on July 1, 2014, admitted as Exhibit 4 at trial. 1RP 244. One of the rules was to notify the sheriff's office within three days of changing address. 1RP 245. Edie explained the rules to Dalluge. 1RP 245-46, 304. Dalluge complied with requirements while he had a fixed residence, filling out verification requests and notifying the sheriff's office of a change of address. 1RP 246-51; Ex. 5, 6, 8, 9, 10A.

¹ Citation as follows: 1RP - three consecutively paginated volumes consisting of 11/1/17, 4/18/18, 4/19/18, 4/20/18, 4/23/18; 2RP - one volume consisting of 10/16/17, 10/23/17, 10/30/17, 12/4/17, 3/26/18, 4/16/18, 4/30/18, 5/1/18; 3RP - one volume consisting of 4/20/18, 4/23/18.

Deputy Hutchison is the current Sex Offender Registration Deputy. 1RP 346. He testified that homeless people are required to come into the office every Monday. 1RP 417. They are to drop off their paperwork, which includes seven slots for indicating the "location that they slept and where they stayed for the previous week." 1RP 349. According to Edie, transients are required to fill out and sign a "Transient Form," listing the physical address where they stayed on each of the seven previous nights, and bring it into the sheriff's office. 1RP 237.

Hutchison started his position in September 2016. 1RP 409-10. His first contact with Dalluge was in January 2017. 1RP 411. Dalluge had a fixed residence at the time. 1RP 351-52. Hutchison did not recall Dalluge being homeless prior to March 2017. 1RP 411-12. Hutchison never explained to Dalluge what he must do if he became homeless. 1RP 412.

As reflected in the to-convict instruction, the charging period for failing to register was March 29, 2017 through May 26, 2017. CP 61, 77. In a note dated March 29, 2017, Dalluge wrote to Hutchison that a domestic dispute arose and "we need to talk or stay in contact" if it was not resolved expediently. 1RP 352-53; Ex. 15. In response, Hutchison left a voice message on Dalluge's phone. 1RP 353.

Deputy Wester interacted with Dalluge at the sheriff's office on April 14. 1RP 307-08. Dalluge inquired about paperwork that was needed, as he did not have a residence or address of his own at the time. 1RP 308-09. Wester called Deputy Hutchison to inquire about the proper procedure. 1RP 309. Hutchison instructed Wester to give the homeless paperwork to Dalluge and have him fill it out. 1RP 354. He told Wester the paperwork was due next Monday, and Dalluge should call him when he turned it in. 1RP 354. Wester got the transient form and went over it with Dalluge. 1RP 310. Dalluge appeared to understand. 1RP 310. March 29 was the first time that Dalluge would have received homeless paperwork to fill out. 1RP 420-21. Hutchison could not recall if Dalluge signed off on the rules and requirements since initially registering in 2014. 1RP 407. He later clarified that the rules and requirements are gone over once, when a person first registers. 1RP 429-30.

Hutchison identified a temporary order for protection entered March 28, 2017 as an order that evicted Dalluge from the home he shared with his mother and stepfather. 1RP 364-65; Ex. 11. Hutchison learned about the restraining order and eviction when Wester called him. 1RP 380, 415.²

² The temporary order was later extended to May 9, 2017. Ex. 13, 14.

On April 17, Dalluge exchanged text messages with Hutchison. 1RP 354-58; Ex. 16. In one message, Dalluge gave a new address. 1RP 358. Hutchison told him he would stop by and have him sign a verification sheet. 1RP 358. Dalluge said he was not able to be there at the proposed time. 1RP 358. Hutchison attempted to arrange to meet Dalluge at the address, but nothing came of it. 1RP 358-59. Later that day, he drove to the address. 1RP 359. Dalluge was not there, and he was unable to verify that it was Dalluge's address. 1RP 360.

There were further contacts. On April 28, Dalluge left a voicemail for Hutchison. 1RP 377-78, 419-20. On May 4, Dalluge messaged Hutchison, saying he "should have everything sorted out soon." 1RP 360-61; Ex. 17. In a note date-stamped May 9, Dalluge asked Hutchison to contact his attorney regarding the sex offender registration. 1RP 361-62; Ex. 18. In a note date-stamped May 23, Dalluge listed his previous residential address, writing "as I understand, I am fulfilling all necessities. Please correct if I am incorrect." 1RP 362-63; Ex. 19. Following receipt of the May 23 note, Hutchison made no attempt to determine whether Dalluge had moved back home. 1RP 365.

On May 24, Dalluge was in the office, requesting to speak with Hutchison. 1RP 329. After being told Hutchison was on his way, Dalluge left before he arrived. 1RP 329-30. Dalluge returned later that day,

saying he wanted to talk with Hutchison and that he would be around the "juvenile area." 1RP 330. Hutchison went to the office but did not try to find Dalluge in the juvenile court facility. 1RP 375, 420, 424, 431-32.

Pamela Dove, a support specialist in the sheriff's office, testified that Dalluge came into the office in April and May of 2017 on multiple occasions. 1RP 324, 326. He turned in paperwork. 1RP 326. Dalluge did not ask for help in filling out the forms. 1RP 328. But she did recall Dalluge saying he didn't know how to fill out the forms. 1RP 328, 331.

Documentary evidence outside the charging period was admitted. Hutchison identified a document date-stamped June 1, 2017 as a transient form. 1RP 365-67; Ex. 20. It was incorrectly filled out. 1RP 366. Dalluge wrote he had an address but complained the sheriff's office intimidated people. 1RP 366-67. He crossed out "transient/homeless" and wrote "I have a home." 1RP 367.

In a note date-stamped June 6, Dalluge wrote he was having an agency help him with the forms "because of my disabilities." 1RP 370; Ex. 21. In a note date-stamped June 13, Dalluge referred to himself as a "vulnerable disable adult" and wrote that he was discussing Hutchison with the county commissioners. 1RP 370-71; Ex. 22. A blank transient form was attached to the paperwork. 1RP 371. A transient form date-stamped June 19 was left blank except Dalluge had written "cannot read or

write." 1RP 371-72; Ex. 23. There was no medical evidence in the sheriff's office files indicating Dalluge's mental state or ability to read or write. 1RP 405.

Hutchison never received a filled-out transient form from Dalluge. 1RP 373, 376. Hutchison acknowledged homeless people do not have an address to report. 1RP 415-16. Hutchison said they are supposed to report the location where they sleep at night, for example, "the corner of Airway and Cochran in Moses Lake in the grass." 1RP 416. Or if a person slept in a vehicle parked in front of a house, the person would put down the address. 1RP 416. The form doesn't say what to do if a homeless person doesn't sleep somewhere at night. 1RP 416-17.

2. Dalluge's Absence

Before trial, the court permitted Dalluge to represent himself. 1RP 70. The court later appointed standby counsel. 2RP 67. On April 19, Dalluge was in the midst of cross-examining Deputy Hutchison at trial when the court recessed for the day. 1RP 388. The next day, before Hutchison resumed testimony, Dalluge informed the court that he was in distress. 3RP 5. He had trouble with his vision and difficulty standing and breathing. 3RP 5. He asked for permission to see "medical," saying "I should be in the hospital right now." 3RP 5. Dalluge acknowledged standby counsel could step in "[i]f it comes to that," but he wanted to

continue. 3RP 5-6. The court told him that standby counsel could take over representation if Dalluge was unable to continue "as your own personal counsel." 3RP 6. Dalluge said he was having trouble following what the court said, asking if he could "please go to medical." 3RP 6. The court recessed for about a half hour to allow Dalluge to be checked out by a nurse. 3RP 8-9.

Following the recess, the court put on the record that Dalluge was not present and "as I understand it further that he is refusing to come up." 3RP 9. The physician's assistant who examined Dalluge told the court "I believe he's having a panic attack. That's the most likely scenario." 3RP 10. The assistant noted Dalluge's body signs were stable, although he said he was having problems on the right side of his face and vision problems. 3RP 10-11.

The assistant initially said she could not identify any physical symptoms that he was having a panic attack. 3RP 11-12. She would usually expect to see shakiness, high pulse, sweating, or labored breathing, which Dalluge did not exhibit. 3RP 17, 19. A panic attack usually manifests with different vital signs, but she was not certain in Dalluge's case because it was a "mental issue." 3RP 18. The assistant elsewhere acknowledged that having vision problems can be a symptom of a panic attack. 3RP 15. He basically needed time to calm down. 3RP 16. Again,

she did not know whether it was a true panic attack, but it was the most likely scenario. 3RP 11.

The judge asked if, in her opinion, anything prevented Dalluge from coming to court and listen to testimony. 3RP 12. The assistant did not think so. 3RP 12. Standby counsel elicited from the assistant that Dalluge thought it was a panic attack. 3RP 13. Panic attacks are treated by "talk[ing] them down" — "you just have to clam down essentially and get out of the . . . zone that he's in." 3RP 14. The assistant had no way to determine how long it might take for Dalluge to calm down. 3RP 14, 16.

According to the assistant, Dalluge's vitals were normal; it was a "mental issue." 3RP 16-17. The court asked, "I just want to make sure you're saying at this point you have no basis to believe that he has a panic attack other than his subjective history that he's giving?" 3RP 19. The assistant said that was correct. 3RP 19.

The court asked the attorneys about the options. 3RP 20. The prosecutor said the trial can be continued without the defendant but the requisite procedures need to be followed very carefully. 3RP 21. The court asked if Dalluge needed to be physically returned to court to be advised about the options for proceeding. 3RP 22. The prosecutor suggested standby counsel explain the law to him. 3RP 22-23.

When asked by the judge about his thoughts on how to proceed, standby counsel said it sounded like Dalluge was having a panic attack. 3RP 23. The court responded "Well, nobody's told us he's having a panic attack. I know you're making that conclusion." 3RP 23. Standby counsel asked for a short amount of time to check on Dalluge's status and talk with him about what they were contemplating doing. 3RP 23.

Standby counsel confirmed he would be ready to proceed as counsel, subject to Dalluge's permission. 3RP 24.³ Standby counsel also suggested a continuance until the next day would be appropriate because Dalluge represented himself and he was "having some sort of panic attack." 3RP 26.

The court asked the prosecutor for guidance on procedure. 3RP 26-27. The prosecutor cited a number of cases and asked for more time to look into the matter. 3RP 27-30. The court recessed, directing standby counsel to explain to Dalluge "what was discussed here," meaning the physician assistant's findings or lack thereof, and the three options on the table: (1) proceeding with Dalluge in court with standby counsel taking over as counsel; (2) proceeding without Dalluge in court with standby

³ Standby counsel had earlier indicated "I may have an objection" to terminating Dalluge's self-representation and having him assume the role of counsel. 3RP 8. The court noted the objection for the record. 3RP 24.

counsel taking over as counsel; or (3) proceeding without Dalluge in court with no attorney representing him. 3RP 30.

The court also wanted the physician's assistant to check on Dalluge again, explaining "I can't find anything at this point to conclude one way or the other, or to conclude that rather he's suffering from panic attack." 3RP 31. The court recessed for a little less than an hour. 3RP 33.

When court resumed, the physician's assistant reported that Dalluge's vital signs were stable and, although he complained of weakness and wanted to lay down, there were no "objective findings for him to be having these problems as far as I can see." 3RP 34. In her opinion, Dalluge was physically able to come to the courtroom. 3RP 34. The court asked the assistant if she had asked Dalluge if he were willing to come to court. 3RP 34-35. The assistant answered "well, I said to him, you know, when you go back to court, and he said I don't think I can go to court." 3RP 35. He did not act any different than when she examined him the first time. 3RP 35.

Standby counsel said Dalluge did not want to come to court and had authorized counsel to proceed without him, including authority to continue the cross-examination. 3RP 36. According to counsel, Dalluge did not want to testify. 3RP 36. A continuance was not requested, as

Dalluge asked counsel to "proceed without him present." 3RP 36. As summed up by counsel, "I'm taking over for Mr. Dalluge." 3RP 37.

The prosecutor asked the court to find that Dalluge's absence was voluntary. 3RP 38. The court summarized what had happened up to then. 3RP 38-40. The physician's assistant indicated Dalluge could possibly be experiencing a panic attack, but "couldn't find any physical signs or symptoms that would support that conclusion." 3RP 39. The assistant believed Dalluge was physically able to return to the courtroom and "she expects that he would be able to do that if in fact he wanted to." 3RP 40. Dalluge authorized counsel to proceed on his behalf and "he at this point is refusing, or decided that he does not wish to be up here for the remainder of the trial today." 3RP 40. Based on these circumstances, the court found Dalluge "has made a decision to voluntarily waive his presence here in the courtroom for the remainder of the trial." 3RP 40. The court similarly found Dalluge made a knowing and intelligent decision "not to appear today or for the remainder of the trial." 3RP 41.

The trial resumed that same day, with defense counsel continuing the cross-examination of Deputy Hutchison. 1RP 403. The court referenced Dalluge's absence and instructed the jury "not to speculate as to the reasons for his absence nor are you to consider his absence for any purpose in this trial." 1RP 402-03.

After Hutchison finished testifying and the State rested, counsel made a motion to dismiss the charge based on insufficient evidence. 1RP 433-37. The court denied the motion. 441. A jury instruction conference was held. 1RP 443-77. Closing arguments took place that same day. 1RP 498-555. The jury retired to deliberate. 1RP 561. The court then recessed for the day. 1RP 561.

3. Jury Instructions

The to-convict instruction provides:

To convict the defendant of the crime of failure to register as a sex offender, each of the following elements of the crime must be proved beyond a reasonable doubt:

- (1) Prior to March 29, 2017, the defendant was convicted of a felony sex offense, Rape in the Third Degree;
- (2) That due to that conviction, the defendant was required to register in the State of Washington as a sex offender between March 29, 2017 and May 26, 2017;
- (3) That during that time period, the defendant knowingly failed to comply with any of the following sex offender registration requirements:
 - (a) the requirement that the defendant, who had a fixed residence but later lacked one, provide signed written notice to the sheriff of the county where the defendant last registered within three business days after ceasing to have a fixed residence;
 - (b) the requirement that the defendant, lacking a fixed residence, report weekly on a day specified by the county sheriff's office and during normal business hours, in person, to the sheriff of the county where the defendant is registered;
 - (c) the requirement that the defendant, lacking a fixed residence, comply with a request from the county

sheriff for an accurate accounting of where the defendant stayed during the week.

If you find from the evidence that elements (1) and (2), and any of the alternative elements 3(a), 3(b), or 3(c) have been proved beyond a reasonable doubt, then it will be your duty to return a verdict of guilty. To return a verdict of guilty, the jury need not be unanimous as to which of the alternatives 3(a), 3(b), or 3(c) has been proved beyond a reasonable doubt, as long as each juror finds that at least one alternative has been proved beyond a reasonable doubt.

On the other hand, if, after weighing all the evidence, you have a reasonable doubt as to any one of elements (1), (2), or (3), then it will be your duty to return a verdict of not guilty. CP 77 (Instruction 12).⁴

The defense submitted a written proposed jury instruction, which reads as follows:

If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsections (3)(a)(vii) or (viii) and (5) of this subsection. To prevail, the person must prove the defense by a preponderance of the evidence.

Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably than not true. CP 60.

This affirmative defense instruction was discussed at the jury instruction conference. 1RP 448-55, 458-67. The prosecutor pointed out

⁴ The State charged Dalluge with one count of failure to register. CP 61-62.

"it's an affirmative defense that you complied with all the requirements you were supposed to comply with" and "this doesn't give us any -- anything new in the jury instructions." 1RP 449. "If the offender followed all of the rules, it's an affirmative defense that they have followed all the rules." 1RP 454. "It seems a little odd, you know, to -- to make that as an affirmative defense instruction because I don't see anything different in here than what we're saying the law is." 1RP 454. The court said, "it's kind of just a reiteration of the fact that he either complied or didn't comply." 1RP 450-51. The court also commented "we're just telling them what the statute says." 1RP 454.

The attorneys noted the subsections referenced in the proposed instruction had been renumbered in the statute. 1RP 451-52. The attorneys agreed to set forth the relevant subsections at issue in the instruction, but the court proposed the relevant requirements be set forth without numbering them. 1RP 453-55. The attorneys and the court subsequently discussed the precise wording of the instruction in further depth. 1RP 457-67. Defense counsel persuaded the court to give the version of the instruction that was ultimately provided to the jury. 1RP 458-61, 463-67.

The affirmative defense instruction given to the jury provides:

If any person required to register pursuant to this section does not have a fixed residence, it is an affirmative defense to the charge of failure to register, that he or she provided written notice to the sheriff of the county where he or she last registered within three business days of ceasing to have a fixed residence and has subsequently complied with the requirements of subsection (6) of this section, which provides:

(6)(a) Any person required to register under this section who lacks a fixed residence shall provide signed written notice to the sheriff of the county where he or she last registered within three business days after ceasing to have a fixed residence. The notice shall include the information required by subsection (2)(a) of this section, except the photograph, fingerprints, and palmprints. The county sheriff may, for reasonable cause, require the offender to provide a photograph and fingerprints. The sheriff shall forward this information to the sheriff of the county in which the person intends to reside, if the person intends to reside in another county.

Subsection (2)(a) provides:

(2)(a) A person required to register under this section must provide the following information when registering: (i) Name and any aliases used; (ii) complete and accurate residential address or, if the person lacks a fixed residence, where he or she plans to stay; (iii) date and place of birth; (iv) place of employment; (v) crime for which convicted; (vi) date and place of conviction; (vii) social security number; (viii) photograph; and (ix) fingerprints.

(6)(b) A person who lacks a fixed residence must report weekly, in person, to the sheriff of the county where he or she is registered. The weekly report shall be on a day specified by the county sheriff's office, and shall occur during normal business hours. The person must keep an accurate accounting of where he or she stays during the week and provide it to the county sheriff upon request. The lack of a fixed residence is a factor that may be considered

in determining an offender's risk level and shall make the offender subject to disclosure of information to the public at large pursuant to RCW 4.24.550.

To prevail, the person must prove the defense by a preponderance of the evidence. Preponderance of the evidence means that you must be persuaded, considering all of the evidence in the case, that it is more probably true than not. CP 83 (Instruction 18).

4. Outcome and Sentencing

The jury found Dalluge guilty. CP 86.⁵ By special verdict, the jury found Dalluge, lacking a fixed residence, failed to comply with a request from the county sheriff for an accurate accounting of where he stayed during the week. CP 87. Also by special verdict, the jury unanimously answered "no" to whether Dalluge failed to comply with the weekly reporting requirement. CP 87. The jury could not unanimously agree on whether Dalluge failed to notify the sheriff within three business days after ceasing to have a fixed residence. CP 87.

Dalluge was present for sentencing. 2RP 125-26. The court imposed a sentence of 45 days in jail and 12 months of community custody. CP 94-95. As part of the judgment and sentence, the court ordered Dalluge to pay a \$200 criminal filing fee, a \$100 DNA fee, and

⁵ It is unclear whether Dalluge was present for the return of the verdict. The court's remark about who was present is ambiguous. 3RP 49.

the cost of community supervision. CP 95-96. This appeal follows. CP 107-08.

C. **ARGUMENT**

1. **DEFENSE COUNSEL RENDERED INEFFECTIVE ASSISTANCE IN REQUESTING AN AFFIRMATIVE DEFENSE INSTRUCTION THAT SHIFTED THE BURDEN OF PROOF FROM THE STATE, WHERE IT BELONGED, TO DALLUGE, WHERE IT DIDN'T.**

Although the State had the burden of proving Dalluge's knowing failure to comply with registration requirements, his trial counsel argued for a jury instruction that required the defense to prove by a preponderance of the evidence that Dalluge complied with the requirements. Dalluge received ineffective assistance of counsel because the affirmative defense instruction shifted the burden of proof to Dalluge.

The accused is guaranteed the constitutional right to the effective assistance of counsel. Strickland v. Washington, 466 U.S. 668, 685-86, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); U.S. Const. amend. VI; Wash. Const. art. I § 22. The constitutional right to effective assistance "exists, and is needed, in order to protect the fundamental right to a fair trial." Id. at 684. Defense counsel is ineffective where (1) the attorney's performance was deficient and (2) the deficiency prejudiced the defendant. Id. at 687. Ineffective assistance claims are reviewed de novo. State v. Sutherby, 165 Wn.2d 870, 883, 204 P.3d 916 (2009).

The doctrine of invited error "generally forecloses review of an instructional error, but does not bar review of a claim of ineffective assistance of counsel based on such instruction." State v. Woods, 138 Wn. App. 191, 197, 156 P.3d 309 (2007). "A claim of ineffective assistance of counsel is an issue of constitutional magnitude that may be considered for the first time on appeal." State v. Kyllo, 166 Wn.2d 856, 862, 215 P.3d 177 (2009).

The proposed affirmative defense instruction was filed and argued over on April 20, the same day that Dalluge was absent and the court ruled standby counsel would take over as Dalluge's attorney. CP 59-60. Although the written proposal was submitted in the name of the attorney as standby counsel, counsel affirmatively advocated for the instruction during the jury instruction conference, at which time Dalluge no longer represented himself. At that point, the decision to seek the affirmative defense instruction therefore rested with counsel, not his client.

Deficient performance is that which falls below an objective standard of reasonableness. Strickland, 466 U.S. at 688. The decision to seek a jury instruction ultimately rests with defense counsel. State v. Grier, 171 Wn.2d 17, 32, 246 P.3d 1260 (2011) (addressing lesser offense instruction). Thus, whether to seek an affirmative defense instruction is a strategic decision for the attorney to make. State v. Perez, 166 Wn. App.

55, 62, 269 P.3d 372 (2012). Here, defense counsel advocated for the affirmative defense instruction. But "[n]ot all strategies or tactics on the part of defense counsel are immune from attack. 'The relevant question is not whether counsel's choices were strategic, but whether they were reasonable.'" Grier, 171 Wn.2d at 33-34 (quoting Roe v. Flores-Ortega, 528 U.S. 470, 481, 120 S. Ct. 1029, 145 L. Ed. 2d 985 (2000)). Only legitimate trial strategy or tactics constitute reasonable performance. Kyllo, 166 Wn.2d at 869. No legitimate strategy justified the affirmative defense instruction in this case.

The State had the burden to prove Dalluge failed to comply with the registration requirements. The to-convict instruction required the State to prove that Dalluge knowingly failed to (1) provide written notice to the sheriff within three business days of lacking a fixed residence; (2) report to the sheriff on a weekly basis; or (3) comply with a request to provide an accurate accounting of where he stayed during the week. CP 74. The to-convict instruction tracks the statutory definition of the crime. RCW 9A.44.130(6)(a), (b).

The affirmative defense instruction, however, imposed the burden of proving compliance with these requirements on Dalluge. CP 83. That instruction stated it is an affirmative defense to the charge of failure to register that Dalluge provided written notice to the sheriff within three

business days of lacking a fixed residence and that he subsequently complied with the requirements of subsection (6). The subsection (6) requirements include reporting to the sheriff on a weekly basis and compliance with a request to provide an accurate accounting of where he stayed during the week. Id. The jury was informed "[t]o prevail, the person must prove the defense by a preponderance of the evidence. Id.

Elements of the State's case were replicated in the affirmative defense instruction, where Dalluge was required to prove he complied with the requirements. The affirmative defense instruction created an inconsistency that misstated the law. It shifted the burden of proof onto the defendant. Counsel was ineffective in seeking to have the jury instructed in this manner.

State v. Carter, 127 Wn. App 713, 716-18, 112 P.3d 561 (2005) is instructive. In Carter, Division Three of this Court held defense counsel was ineffective for proposing an unwitting possession of a firearm instruction. Id. at 716-18. The defendant was charged with first degree unlawful possession of a firearm. Id. at 715. Knowing possession is an element of the offense. Id. at 717. Defense counsel proposed an affirmative defense instruction: "*The burden is on the defendant to prove by a preponderance of the evidence that the firearm was possessed unwittingly.*" Id. This instruction "erroneously placed the burden of

proving unwitting possession on Robert Carter." Id. The Carter court reasoned that defense counsel performed deficiently because no reasonable attorney would have proposed an instruction erroneously shifting the burden of proof to the defense and no legitimate trial tactic could justify such performance. Id. at 717.

The same reasoning applies to Dalluge's case. In both cases, counsel advanced an affirmative defense instruction that required the defendant to prove something in order to avoid conviction. In both cases, the affirmative defense instruction impermissibly shifted the burden of proof onto the defendant by incorporating an element of the State's case into the defense. As in Carter, the jury here was instructed in a clearly inconsistent manner. On the one hand, it was told the State needed to prove Dalluge failed to adhere to one of three specific registration requirements. On the other hand, it was told it was a defense to the charge if Dalluge proved he complied with those same requirements. Requiring Dalluge to prove he complied with the registration requirements by a preponderance of the evidence improperly shifted the State's burden to prove Dalluge did not comply with the requirements.

In closing, defense counsel argued that Dalluge proved he "subsequently" complied with the requirements after providing notice to the sheriff within three days of ceasing to have a fixed residence because

the State did not additionally charge him for anything beyond May 26, the end of the charging period in this case. 1RP 531-33. He argued Dalluge proved the affirmative defense because "the State didn't charge him through today." 1RP 533. That is an objectively unreasonable argument. The supposed lack of a charge is not evidence of anything. Further, as pointed out by the prosecutor in rebuttal, defense counsel's argument was based on a fact not in evidence. 1RP 552. It would have been improper for the State to present evidence on an additional charge. 1RP 551-52.⁶ Even based on defense counsel's interpretation of the affirmative defense, there was no evidence to support it. Defense counsel argued "there's no evidence he hasn't complied." 1RP 531. The affirmative defense, however, required Dalluge to prove that he did comply. It required Dalluge to prove he did not break the law, instead of requiring the State to prove that he did break the law.

The prosecutor correctly pointed out in closing argument that "if you look carefully at Instruction 18 where it says it's a defense to a crime, you'll see that what the affirmative defense is is that you actually did. Okay. That's the defense. 'I registered. I satisfied the requirement.' . . .

⁶ In pre-trial proceedings, the prosecutor represented that there was another pending charge of failure to register against Dalluge that covered a time period subsequent to the charging period in the present case. 1RP 84-85; 2RP 100-01.

That's the affirmative defense." 1RP 503. "Instruction 18 is pretty much verbatim the language of the statute." 1RP 503. "The affirmative defense . . . is actually just the law. The affirmative defense, as I said, is a statement of the requirements, and the affirmative defense is 'I fulfilled them.'" 1RP 522. The affirmative defense instruction was a restatement of the registration requirements, with the gloss that Dalluge could escape conviction if he proved he complied with them. Defense counsel was deficient in pursuing an instruction that shifted the burden of proof.

Dalluge was prejudiced by counsel's deficient performance. Here, too, Carter is instructive. In Carter, the court rejected the State's argument that the defendant failed to demonstrate prejudice in light of other instructions that properly informed the jury of the State's burden. Carter, 127 Wn. App at 718. The flawed unwitting possession instruction created an inconsistency in the instructions as a whole and because "the inconsistency results from a clear misstatement of the law, the misstatement is presumed to have misled the jury in a manner prejudicial to the defendant." Id.

As in Carter, the jury in Dalluge's case was misled to believe Dalluge had the burden of proving he complied with the registration requirements. The inconsistent instruction involving this burden of proof

was a clear misstatement of the law. Dalluge is presumed to have been prejudiced. The conviction must therefore be reversed.

2. THE COURT VIOLATED DALLUGE'S RIGHT TO BE PRESENT AT CRITICAL STAGES OF THE TRIAL.

Dalluge was absent for part of Detective Hutchison's testimony and all of closing argument. 1RP 401-03. The court erred in preliminarily finding that Dalluge voluntarily absented himself from trial. In the alternative, the court erred in failing to give Dalluge an opportunity to explain his absence following his return to court.

A defendant in a criminal case "has a fundamental right to be present at all critical stages of a trial." State v. Irby, 170 Wn.2d 874, 880, 246 P.3d 796 (2011) (citing Rushen v. Spain, 464 U.S. 114, 117, 104 S. Ct. 453, 78 L. Ed. 2d 267 (1983)); U.S. Const. amend. VI, XIV; Wash. Const. art. 1, §§ 3, 22. Critical stages are those in which the defendant's presence "would contribute to the fairness of the procedure" or where it "has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." Kentucky v. Stincer, 482 U.S. 730, 745, 107 S. Ct. 2658, 96 L. Ed. 2d 631 (1987). The confrontation of witnesses and evidence against the accused is a critical stage. Id. Defendants also have the right to be present during closing arguments. Larson v. Tansy, 911 F.2d 392, 395-96 (10th Cir. 1990).

"[T]he trial court's decision to proceed with trial in the defendant's absence" is reviewed for abuse of discretion. State v. Thurlby, 184 Wn.2d 618, 624, 359 P.3d 793 (2015). On the other hand, "[w]hether a defendant's constitutional right to be present has been violated is a question of law, subject to de novo review." Irby, 170 Wn.2d at 880.

A defendant may waive the right to be present at trial, but the waiver must be knowing and voluntary. Thurlby, 184 Wn.2d at 624. If the defendant is voluntarily absent, trial may continue without him. State v. Garza, 150 Wn.2d 360, 367, 77 P.3d 347 (2003). "In determining whether a defendant's absence was voluntary, the trial court must (1) make a sufficient inquiry into the circumstances of a defendant's disappearance to justify a finding whether the absence was voluntary; (2) make a preliminary finding of voluntariness (when justified); and (3) afford the defendant an adequate opportunity to explain his absence when he is returned to custody and before sentence is imposed." Id. at 788.

"The 3-prong voluntariness inquiry ensures the court will examine the circumstances of the defendant's absence and conclude the defendant chose not to be present at the continuation of the trial." State v. Thomson, 123 Wn.2d 877, 883, 872 P.2d 1097 (1994). "In performing this analysis, the trial court must examine the totality of the circumstances and indulge every reasonable presumption against waiver." Thurlby, 184 Wn.2d at

626. "The presumption against waiver must be the overarching principle throughout the inquiry." Garza, 150 Wn.2d at 368.

Dalluge first challenges the court's preliminary finding that he voluntarily absented himself from trial. 3RP 40-41. The court emphasized the physician's assistant did not find any physical manifestations of a panic attack. 3RP 39. This is accurate insofar as Dalluge's vital signs were normal. 3RP 17-19. But there was a physical manifestation of the attack. Dalluge said he was having problems with his vision. 3RP 5, 10-11. The assistant acknowledged vision problems can be a symptom of a panic attack. 3RP 15. A panic attack usually manifests with changed vital signs, but the assistant was uncertain in Dalluge's case because it was a "mental issue." 3RP 16-18.

The court further noted the assistant believed Dalluge was physically able to return to the courtroom and "she expects that he would be able to do that if in fact he wanted to." 3RP 40. The first part is accurate. 3RP 34. But the assistant never said she expected Dalluge would be able to return if he wanted to. Even if the record were interpreted to show the assistant said this, it remains to be explained how someone suffering from panic attack could return to court if he wanted to. Dalluge's mental condition would be an impediment to returning.

The court also said Dalluge authorized counsel to proceed on his behalf and "he at this point is refusing, or decided that he does not wish to be up here for the remainder of the trial today." 3RP 40. The question, though, is whether Dalluge made that choice freely. The assistant told the court "I believe he's having a panic attack. That's the most likely scenario." 3RP 10. The court, deferring to the assistant's judgment, never found Dalluge was faking a panic attack. And if Dalluge was suffering from a panic attack at the time he declined to come to court, it cannot be said his refusal was truly voluntary, as an acute mental infirmity prevented him from returning. Someone under the influence of a panic attack cannot be said to exercise unfettered judgment.

The trial court, in determining whether Dalluge's absence was voluntary, needed to "indulge every reasonable presumption against waiver." Thurlby, 184 Wn.2d at 626. The trial court did not heed the presumption. The court could not conclude one way or the other whether Dalluge was really suffering from a panic attack. 3RP 31. The court's inability to determine if Dalluge was truly stricken by a panic attack does not overcome a presumption against waiver of presence and precludes a preliminary finding of voluntariness.

A trial court abuses its discretion if its decision if its findings are unsupported by the record. In re Marriage of Littlefield, 133 Wn.2d 39,

47, 940 P.2d 1362 (1997). For the reasons set forth, the record does not support the court's preliminary finding of voluntary absence. Reversal is required when the record does not establish voluntary waiver of the right to be present. State v. Atherton, 106 Wn. App. 783, 785, 24 P.3d 1123 (2001).

Even if the court's preliminary finding of voluntariness is sound, the court still erred in failing to seek Dalluge's explanation for his absence once he returned to court. "The trial court must give a defendant the opportunity to explain the absence." Garza, 150 Wn.2d at 371. This third step of the legal analysis allows the accused person a chance to rebut the court's preliminary finding that the absence was voluntary. Id. at 367. At minimum, the court must "listen to the defendant's explanation" of the absence. State v. Cobarruvias, 179 Wn. App. 523, 527, 318 P.3d 784 (2014) abrogated on other grounds by State v. Thurlby, 184 Wn.2d 618, 359 P.3d 793 (2015). The court must then determine what actually happened and assess the reasonableness of the defendant's actions in light of the totality of the circumstances. Id. The court must view the defendant's explanation "in a generous light," applying every reasonable inference against waiver. Thurlby, 184 Wn.2d at 629-30.

The trial court failed to do so here. The court skipped the third step in the analysis entirely. The court erred in not giving Dalluge an

opportunity to explain why he did not come to court and was not present for the examination of the Deputy Hutchison and the closing arguments. When Dalluge returned to court at the hearing in which sentencing was continued, and at the sentencing hearing itself, the court at no time asked Dalluge for an explanation of why he did not previously come to court. 2RP 115-31.

In Thurlby, the trial court provided the defendant with an opportunity to explain her nonattendance prior to sentencing. Thurlby, 184 Wn.2d at 623. Thurlby explained she was absent because her mother underwent an unplanned surgery midway through trial. Id. Thurlby's mother told the trial court about her health problems. Id. The trial court "considered Thurlby's explanation regarding her mother's surgery and found that, although understandable, Thurlby's absence was the product of choice and therefore voluntary. Id. at 630. This satisfied the requisite legal standard for waiver because "the trial court provided Thurlby with an opportunity to explain her absence and evaluated Thurlby's absence in light of her justification." Id. at 626.

In contrast, the trial court here did not prove Dalluge an opportunity to explain his absence. The trial continued in his absence. The court did not ask Dalluge at sentencing why he did not come to court.

Use of an incorrect legal standard constitutes an abuse of discretion. Cobarruvias, 179 Wn. App. at 528. The failure to exercise discretion is also an abuse of discretion. State v. Grayson, 154 Wn.2d 333, 342, 111 P.3d 1183 (2005). Here, the trial court failed to apply the correct legal standard and failed to exercise its discretion when it did not ask Dalluge to explain his absence upon his return to the courtroom. Such inquiry is part of the test for assessing voluntariness based on the totality of circumstances. Garza, 150 Wn.2d at 367. The court misapplied the law when failed to engage in the third step of the inquiry by asking Dalluge to explain his absence, thereby omitting one of the circumstances necessary to accurately assess voluntariness. Id. The court also misapplied the law by failing to apply the presumption against waiver, instead assuming, without inquiring upon Dalluge's return, that Dalluge's absence had been voluntary. Thurlby, 184 Wn.2d at 629-30.

"Unless the trial court determines that the circumstances justify a renewed finding of voluntary absence, the court must declare a mistrial." Garza, 150 Wn.2d at 371. Here, the court made no renewed finding of voluntary absence. Because the trial court failed to offer Dalluge the opportunity to explain his absence upon his return to court and failed to make a renewed finding on voluntary waiver, a new trial is required.

4. THE COURT LACKED STATUTORY AUTHORITY TO IMPOSE DISCRETIONARY COSTS ON DALLUGE DUE TO INDIGENCY AND ALSO LACKED AUTHORITY TO IMPOSE INTEREST ON NON-RESTITUTION LEGAL FINANCIAL OBLIGATIONS

Recent statutory amendments addressing legal financial obligations (LFOs) prohibit the imposition of discretionary costs on indigent defendants. Here, the court imposed a \$200 filing fee and supervision costs, and a \$100 DNA fee. Because Dalluge is indigent, these discretionary costs must be stricken. The law on interest has changed as well, no longer applying to non-restitution costs. The interest provision in each judgment and sentence must be corrected.

a. The record shows Dalluge's indigency at the time of sentencing, and discretionary costs cannot be imposed on those who are indigent.

RCW 10.01.160(1) authorizes the court to impose costs on a convicted defendant. This general authority is discretionary. The statute states the court "*may* require the defendant to pay costs." RCW 10.01.160(1) (emphasis added). Recent amendments to the LFO statute prohibit the imposition of costs on indigent defendants. "The court shall not order a defendant to pay costs if the defendant at the time of sentencing is indigent as defined in RCW 10.101.010(3) (a) through (c)." RCW 10.01.160(3). This language became effective on June 7, 2018.

The statute defines "indigent" as a person (a) who receives certain forms of public assistance, (b) is involuntarily committed to a public mental health facility, (c) whose annual after-tax income is 125% or less than the federally established poverty guidelines, or (d) whose "available funds are insufficient to pay any amount for the retention of counsel" in the matter before the court. RCW 10.101.010(3).

Dalluge's indigency at the time of sentencing is established in the record. The trial court found Dalluge indigent and allowed this appeal at public expense. CP 112-13. According to the declaration in support of his indigency motion, Dalluge was unemployed, had no income, no money in the bank and no assets. CP 110; see State v. Ramirez, 191 Wn.2d 732, 747, 426 P.3d 714 (2018) (relying on financial statement in declaration of indigency as evidence of indigency at time of sentencing). Dalluge did not have an income at or above 125 percent of the federal poverty level.⁷

b. The criminal filing fee must be stricken because Dalluge is indigent.

Dalluge was sentenced on May 1, 2018. CP 90. The court imposed a \$200 criminal filing fee as part of the sentence. CP 96. The current, amended version of RCW 36.18.020(2)(h), effective June 7, 2018,

⁷ The current federal poverty guideline is \$12,490. See U.S. Dep't Of Health & Human Servs., Office Of The Asst. Sec'y For Planning & Evaluation, Poverty Guidelines (2019), available at <https://aspe.hhs.gov/poverty-guidelines> (last visited March 20, 2019).

states the \$200 criminal filing fee "shall not be imposed on a defendant who is indigent as defined in RCW 10.101.010(3)(a) through (c)." Laws of 2018, ch. 269, § 17. Engrossed Second Substitute House Bill 1783, 65th Leg., Reg. Sess. (Wash. 2018) (HB 1783), of which the filing fee provision is a part, applies prospectively to cases currently pending on direct appeal. Ramirez, 191 Wn.2d at 747-49. The amendment "conclusively establishes that courts do not have discretion" to impose the criminal filing fee against those who are indigent at the time of sentencing. Id. at 749. In Ramirez, the Supreme Court accordingly struck the criminal filing fee due to indigency. Id. at 749-50. The criminal filing fee must be stricken because Dalluge is indigent and the new law applies to cases pending on appeal.

c. The cost of community supervision is discretionary and therefore must be stricken because Dalluge is indigent.

The court imposed community custody as part of the sentence. CP 95. The judgment and sentence states: "[w]hile on community custody, the defendant shall: . . . (7) pay supervision fees as determined by DOC." CP 95.

RCW 9.94A.703(2)(d) states "*Unless waived by the court, . . . the court shall order an offender to: . . . Pay supervision fees as determined by the Department.*" (emphasis added). Given the language authorizing the

court to waive the cost, the Court of Appeals recently noted the cost of community custody is discretionary. State v. Lundstrom, 6 Wn. App. 2d 388, 396 n.3, 429 P.3d 1116 (2018). Discretionary costs cannot be imposed on indigent defendants. RCW 10.01.160(3). HB 1783, of which RCW 10.01.160(3) is a part, applies to all cases pending on appeal. Ramirez, 191 Wn.2d at 747-49; Laws of 2018, ch. 269 § 6. The cost of supervision must be stricken from the judgment and sentence because Dalluge is indigent.

d. The \$100 DNA fee is discretionary and therefore must be stricken because Dalluge is indigent.

The court ordered Dalluge to pay a \$100 DNA fee as part of the sentence. CP 96. HB 1783 amended RCW 43.43.7541 to read, "Every sentence imposed for a crime specified in RCW 43.43.754 must include a fee of one hundred dollars *unless the state has previously collected the offender's DNA as a result of a prior conviction.*" Laws of 2018, ch. 269, § 18 (emphasis added). HB 1783 "establishes that the DNA database fee is no longer mandatory if the offender's DNA has been collected because of a prior conviction." Ramirez, 191 Wn.2d at 747.

RCW 43.43.754(1) requires collection of a biological sample for purposes of DNA identification analysis from every adult convicted of a felony. Dalluge has previous felony convictions. In fact, he has 12 prior

felony convictions from 1996 to 2016. CP 88-89. He would necessarily have had his DNA collected pursuant to RCW 43.43.754(1). See State v. Maling, __ Wn. App. 2d __, 431 P.3d 499, 501 (2018) (striking DNA fee where appellant's "lengthy felony record indicates a DNA fee has previously been collected.").

Because Dalluge's DNA sample was previously collected based on other felony convictions, the DNA fee in the present case is not mandatory under RCW 43.43.7541. The fee is discretionary. Discretionary costs cannot be imposed on indigent defendants. RCW 10.01.160(3). The sentencing court therefore lacked authority to impose the \$100 DNA fee. The criminal filing fee and DNA fee must therefore be stricken from the judgment and sentence. Maling, 431 P.3d at 501.

e. The notation in the judgment and sentence regarding interest on legal financial obligations is unauthorized by statute.

The judgment and sentence states: "The financial obligations imposed in this judgment shall bear interest from the date of the judgment until payment in full, at the rate applicable to civil judgments." CP 97. This mandate does not comply with current law. The judgment and sentence must be amended to state that non-restitution legal financial obligations will not accrue interest from June 7, 2018.

The current version of RCW 10.82.090(1), effective June 7, 2018, provides in relevant part that "restitution imposed in a judgment shall bear interest from the date of the judgment until payment, at the rate applicable to civil judgments. As of June 7, 2018, no interest shall accrue on nonrestitution legal financial obligations."

This statute was amended as part of HB 1783's overhaul of the LFO system. Laws of 2018, ch. 269 § 1. Again, HB 1783 applies prospectively to cases currently pending on direct appeal. Ramirez, 191 Wn.2d at 747-49. The judgment and sentence, then, must be modified to reflect that no interest shall accrue on non-restitution legal financial obligations as of June 7, 2018 in accordance with RCW 10.82.090(1).

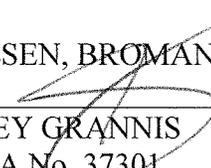
D. CONCLUSION

For the reasons stated, Dalluge requests the conviction be reversed, the challenged LFOs be vacated, and the interest notation in the judgment and sentence be corrected.

DATED this 29th day of July 2019

Respectfully Submitted,

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